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**NAVAL WAR COLLEGE
Newport, RI**

**BEYOND THE 2008 JUSTICE REFORMS:
Establishing a Legitimate Rule of Law in Mexico with Jury Trials**



by

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Commander, U.S. Navy

A paper submitted to the Faculty of the Naval War College in partial satisfaction of the requirements of the Department of Joint Military Operations.

The contents of this paper reflect my own personal views and are not necessarily endorsed by the Naval War College or the Department of the Navy.

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28 October 2011

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ABSTRACT

In Mexico's developing democracy, the weaknesses of the justice system led to corruption in law enforcement and the judiciary as well as the widespread perception of criminal impunity. To address the rising tide of organized crime violence, in 2008 the Government of Mexico passed an 8-year judicial reform plan to transition from an inquisitorial law system to an adversarial law system. However, the judicial reform measures alone do not sufficiently address the problem of achieving legitimacy in the eyes of a distrustful public. A further step of implementing criminal jury trials is necessary to establish a legitimate rule of law in Mexico.

INTRODUCTION

Who says crime doesn't pay? A suspected drug lord who is Mexico's most-wanted fugitive made the Forbes list of billionaires on Wednesday with a fortune described as "self-made." The magazine estimates Joaquin "El Chapo" Guzman's worth at \$1 billion, No. 701 on the list. . . . Often described as Mexico's most powerful cartel kingpin, Guzman has been on the run with a \$5 million reward on his head since 2001, when he escaped from prison apparently hidden in a laundry truck."

- Mark Stevenson, "El Chapo Makes Forbes' Billionaire List."

In 2009, *Forbes* magazine first acknowledged the meteoric rise to billionaire status of Joaquin "El Chapo" Guzman, head of the Sinaloa cartel. This controversial recognition by *Forbes* was soon followed by another distinction: Guzman rose to the number one fugitive atop The World's Most Wanted List following the death of Osama Bin Laden.¹ After his 2001 escape, he began a decade-long violent rampage with impunity to prosecution.² Guzman's legacy underscores the systemic problem of corruption that Mexico now faces.³

Today, the developing democracy of Mexico must overcome both a century of neglect in the justice system and the daily reminders of corruption in the headlines. The 2008 Judicial Reforms will implement promising measures to overcome weaknesses in the rule of law. However, given the current anti-state bias of a resentful public, establishing a legitimate rule of law in Mexico can only be achieved, as legal scholar Stephen D. Morris has noted, by the "institutionalized empowerment of citizens."⁴ Additional measures that

¹ John Henley, "Who is Now on the World's Most Wanted List?," *The Guardian*, May 3, 2011, <http://www.guardian.co.uk/world/2011/may/04/the-worlds-most-wanted-list>.

² Guzman was arrested for drug trafficking in 1993. Even while serving his 20-year sentence at Puente Grande maximum security facility, he continued running his empire from prison. Fearing extradition to the U.S. in 2001, he choreographed his escape in a laundry cart with the collusion of a maintenance worker and prison guards. See David Luhnow and Jose de Cordoba, "The Drug Lord Who Got Away," *Wall Street Journal*, June 13, 2009, <http://online.wsj.com/article/SB124484177023110993.html>.

³ David A. Shirk and Alejandra Rios Cazares, "Introduction: Reforming the Administration of Justice in Mexico," in *Reforming the Administration of Justice in Mexico*, ed. Wayne A. Cornelius and David A. Shirk (Notre Dame: University of Notre Dame Press, 2007), 35.

⁴ Stephen D. Morris, "Mexico's Political Culture: The Unrule of Law and Corruption as a Form of Resistance," *Mexican Law Review* Vol. III No. 2 (2010): 341.

integrate citizens in the justice process are essential to win back legitimacy. Accordingly, Mexico must institute criminal trial by jury to establish a legitimate rule of law.

Mexico has a complicated history regarding rule of law that at one time included jury trials. A concise review will discuss how this rule of law evolved and compare important differences between our familiar justice system of common law-adversarial procedures in the United States and the civil law-inquisitorial procedures in Mexico. The specific weaknesses of rule of law in Mexico will be examined. Additionally, the 2008 Justice Reforms—an undertaking designed to improve transparency in the broken system by implementing adversarial procedures—will be analyzed. Finally, the potential benefits of reinstituting jury trials, including the divergent reform paths of Chile and Argentina, will be discussed. While this paper will only focus on criminal justice, the arguments recommending jury trials may also be applied to civil cases and the increasingly controversial military tribunals to strengthen rule of law.

COUNTERARGUMENT: THE JURY IS OUT

The proposal of jury trials in Mexico stirs controversy. Critics view the 2008 Reform Plan as an expensive program heavily influenced by the United States. Transitioning to an adversarial model of criminal procedures already seems an unwelcome attempt by a foreign power to undermine the long-standing traditions of Mexico. These critics suggest implementing jury trials would bring Mexico even closer to a system of justice undesired by the Mexican people. After all, the U.S. jury system offers several faults that must be considered.

First, a jury may be prone to bias. In theory, the ideal jury system provides for a fair trial by peers, but in practice, this is not always the case. Most importantly, the insurmountable factor of terror caused by the widespread violence in Mexico would only heighten the bias of a fearful jury more afraid of reprisal than justice. Second, while nations like the United States are quick to promote the democratic virtues of a jury system, in practice the seldom used jury falls short of these ideals. In fact, only 1.3 percent of cases are resolved by jury.⁵ Despite the existence of jury trials, most are settled before ever appearing in front of a public forum of peers.

RULE OF LAW IN MEXICO

The term “rule of law” has held various meanings among different cultures throughout history. According to political science professor Li Shuguang, it should be distinguished from “rule *by* law” where “law is a mere tool for the government, which suppresses in a legalistic fashion.”⁶ Both the World Bank and the United Nations reached a similar consensus that rule of law is one of several key dimensions of good governance.⁷ The modern, most widely accepted United Nations definition describes rule of law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.”⁸

⁵ Ryan Y. Park, “The Globalizing Jury Trial: Lessons and Insights from Korea,” *The American Journal of Comparative Law* Vol. 58 (2010): 539.

⁶ Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004), 3.

⁷ The six dimensions of good governance include: Voice and Accountability, Political Stability and Absence of Violence, Government Effectiveness, Regulatory Quality, Rule of Law, and Control of Corruption. See World Governance Indicators, The World Bank, assessed on September 27, 2011, <http://info.worldbank.org/governance/wgi/index.asp>.

⁸ United Nations Security Council, “The Rule of law and Transitional Justice in Conflict and Post-conflict Societies,” *UN Report of the Secretary-General*, August 23, 2004, (S/2004/616).

While jury trials are certainly not a requirement for an effective rule of law, history has shown that lay participation in the justice system helps counter rigid authoritarian rule.⁹ For nearly a century, Mexico suffered from an authoritarian justice system that evolved under influence of both native and conquering cultures. The resultant civil law-inquisitorial system abandoned jury trials in 1929. While today Mexico features an independent judicial branch, the system is no longer perceived as legitimate by the Mexican people. Its origins are more aptly described as rule *by* law.

Courts and the Judiciary

The Federal Government of the United Mexican States is organized much like the United States with separation of powers, including executive, legislative, and judicial branches, granted by the 1917 Constitution. The executive branch role in justice centers upon the Attorney General, a cabinet level appointee, who heads the Office of the General Prosecutor (*Procuraduría General de la República, or PGR*). Among its 18,000 employees, the PGR bureaucracy includes the federal public prosecutors responsible for investigating and prosecuting federal crimes such as drug trafficking. Unfortunately, only 4 percent of PGR employees are public prosecutors, thus contributing to the significant backlog in cases.¹⁰ Even more concerning, few prosecutors (6.6 percent) are described as “legal, honest, efficient, loyal and impartial.”¹¹

⁹ Park, “The Globalizing Jury Trial: Korea,” 535.

¹⁰ Sigrid Arzt, “The Militarization of the Procuraduria General de la Republica: Risks for Mexican Democracy,” in *Reforming the Administration of Justice in Mexico*, 165.

¹¹ Sara Schatz, Hugo Concha, and Laura Magaloni Kerpel, “The Mexican Judicial System: Continuity and Change in a Period of Democratic Consolidation,” in *Reforming the Administration of Justice in Mexico*, 212.

Mexico has a three-tiered judicial branch consisting of the Supreme Court, Circuit courts, and District courts.¹² The highest federal court is the Supreme Court of Justice of the Nation, an 11-member body appointed for 15-year terms. The Supreme Court serves as a forum of last resort to resolve controversies between Federal and State courts and provides administrative oversight, including the appointment of judges, for all federal courts.¹³ The Circuit courts handle appeals from the District courts. The District courts are the lowest level of original jurisdiction for federal cases, including felonies involving organized crime and drug trafficking violence. Approximately 26 percent of inmates currently in prisons were convicted in federal courts.¹⁴

In addition to the federal court system, a similar two-tiered state court system coexists with the State Superior courts handling appeals and State District courts conducting criminal and civil trials in the 31 states and the Federal District of Mexico City (**Figure 1**). The State judiciaries are generally weaker, often subjected to regional politics with the incumbent governor appointing state justices. Further, State court decisions establish no precedent and are often not even published.¹⁵ However, these courts are critically important as approximately 74 percent of inmates currently in the prison system are convicted in the state courts.¹⁶ Each State Attorney General oversees his or her provincial public prosecutors, a hierarchy similar to the federal Attorney General supervision of federal prosecutors. An additional municipal court system exists to handle minor civil disturbances and traffic violations.

¹² Additional special Federal Administrative Tribunals exist to handle specific disputes over elections, taxes, labor, land reform and crimes by military personnel but will not be discussed. See Schatz, "The Mexican Judicial System," 203-4.

¹³ Schatz, "The Mexican Judicial System," 202.

¹⁴ Elena Azaola and Marcelo Bergman, "The Mexican Prison System," in *Reforming the Administration of Justice in Mexico*, 92.

¹⁵ Schatz, "The Mexican Judicial System," 204.

¹⁶ Azaola, "The Mexican Prison System," 92.

Figure 1. Mexico Judicial Map



Source: Lexadin World Law Guide, accessed October 8, 2011. <http://www.lexadin.nl/wlg/pics/maps/mexico.gif>

While the organization of the justice system might seem similar to the United States, a disparity emerges regarding pay and professional standards for lawyers and judges. Although pay might appear inadequate—the average annual salary of a judge is US\$19,512—a recent judiciary survey finds frustration over workloads but a general satisfaction with compensation among judges, prosecutors and public defenders alike.¹⁷ The more likely culprits causing corruption are inconsistent education and a lack of professional standards. Many public and an increasing number of private universities offer law degree programs of lengths varying from 3-5 years to educate the approximately 40,000 practicing attorneys in Mexico.¹⁸ In Mexico, the only requirement to practice law is a state certificate recognizing a law school diploma. Without a professional bar examination, the quality of education is not regulated. In fact, less than 5 percent of attorneys—mostly well-established

¹⁷ Matthew C. Ingram, Octavio Rodriguez Ferreira, and David A. Shirk, *Justiciabárometro: Survey of Judges, Prosecutors, and Public Defenders in Nine Mexican States*, Trans-Border Institute Justice in Mexico Project (San Diego: University of San Diego Press, May 2010), 30.

¹⁸ Hector Fix-Fierro, "The Role of Lawyers in the Mexican Justice System," in *Reforming the Administration of Justice in Mexico*, 262.

academic lawyers—are members of the Mexican Bar Association.¹⁹ Judges are merely more experienced lawyers, eligible for political appointment after a minimum of five years of professional practice.²⁰ The weak professional standards combined with the powerful role of judges and prosecutors in Mexico described below provide a recipe for corruption.

The Civil Law System

History plays an important role in every nation's legal system. For thousands of years, the highly advanced cultures of Mayas and Aztecs relied upon an oral legal tradition in which a tribal authority resolved conflicts. While the seventeenth century Spanish conquests brought European influence to Mexico, many customary legal traditions of indigenous people remained in place.²¹ This colonial mix of legal institutions coexisted until Mexico's independence in 1821 and the first Constitution of 1824. However, this document would not stand the test of time, being repeatedly altered by internal and external interests.²²

The 1824 Constitution of Mexico was based upon the 1812 Constitution of Spain. Along with a federal political system similar to Spain, it instituted an independent judicial branch. However, political conflict eventually subordinated the judiciary to the executive branch. In 1857, a second Constitution was adopted. Then, the 1910 Mexican Revolution gave rise to the third and final 1917 Constitution that codified the subordinate structure that remains today. Notably, under all constitutions and for most of the nineteenth century, jury trials were authorized and extensively used.²³ However, the 1917 Constitution provided

¹⁹ Schatz, "The Mexican Judicial System," 210.

²⁰ *Ibid.*, 209.

²¹ *Ibid.*, 198.

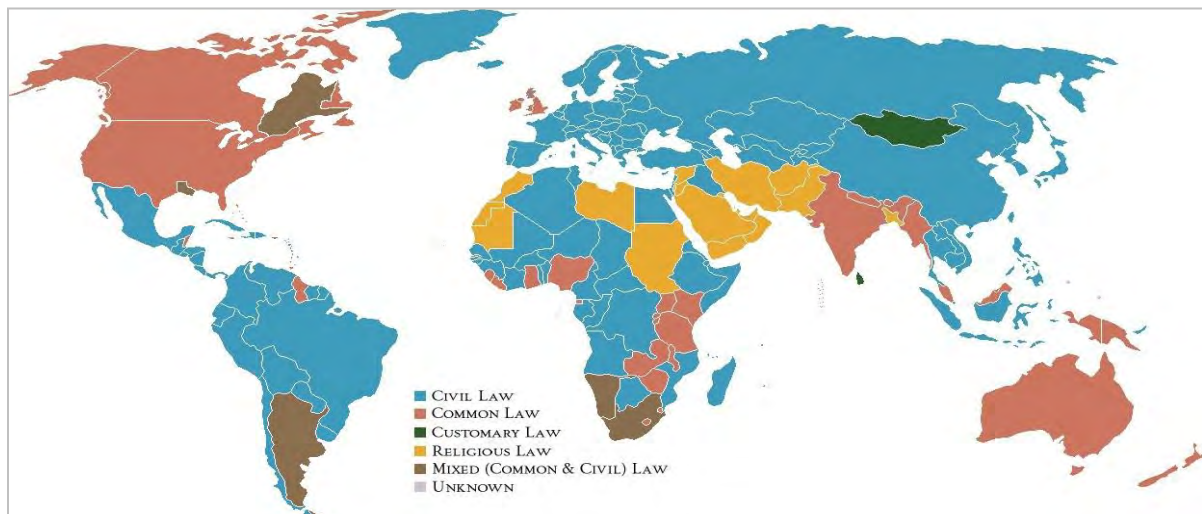
²² Even France played a role, appointing the Austrian monarch, Emperor Maximilian I from 1864-67, who adopted French criminal codes. See José Ramón Cossío, *Mexican Law* (Oxford: Oxford University Press, 2005).

²³ Hiroshi Fukurai, Clark Robert Knudtson, and Susan Irene Lopez, "Is Mexico Ready for a Jury Trial?: Comparative Analysis of Lay Justice Systems in Mexico, the United States, Japan, New Zealand, South Korea, and Ireland," *Mexican Law Review* Vol. II no. 1 (2008): 11.

nearly unlimited power to an authoritarian executive branch that held absolute control over both the legislative and judicial branches.²⁴ The 1917 Constitution also officially adopted a civil law system.

A civil law system is derived from Roman codified law. Civil law is the most widespread system in the world (**Figure 2**) and differs from the common law system of the United States and the United Kingdom. In common law, judicial decisions are normally made by juries. The judges act as mediators and allow greater interpretation of the law by referencing precedent previously established in similar cases. In civil law, judicial decisions are made independently by individual judges using strict interpretation of formally codified statutes.²⁵ In essence, each judge holds legislation as the primary source of law and is unbound by precedent. As the Institutional Revolutionary Party (PRI) rose to executive power in 1929, jury trials in Mexico predictably disappeared.²⁶

Figure 2. Legal Systems of the World



Source: WikiMedia Commons, accessed October 8, 2011. <http://en.wikipedia.org/wiki/File:LegalSystemsOfTheWorldMap.png>

²⁴ Schatz, "The Mexican Judicial System," 199-200.

²⁵ Civil law systems may also use a jury, but juries will nearly always include one or more legally trained judges, also known as mixed tribunals. See Park, "The Globalizing Jury Trial," 532.

²⁶ Fukurai, "Is Mexico Ready for a Jury Trial?," 10.

Evidenced by its worldwide adoption, civil law alone does not necessarily lend itself to corruption when the executive, legislative, and judicial branches of government are in balance. In fact, by design, a civil law system prevents an overreaching judicial branch from legislating new laws. This provides a strong separation of powers. However, when coupled with authoritarian executive control such as a President that appoints justices, commands police forces and controls the prison system and pardons, corruption and impunity may become an epidemic.²⁷ Such is the case in Mexico, compounded over the 71 years of uninterrupted rule by the PRI.²⁸ Unaccountable to prior precedent and typically absent a jury, corrupt judges are free to reach each ruling independent of another, often to appease their political appointer. This weakness is further amplified by Mexico's inquisitorial model of criminal procedures that relies heavily on the prosecuting attorney.

The Inquisitorial Model

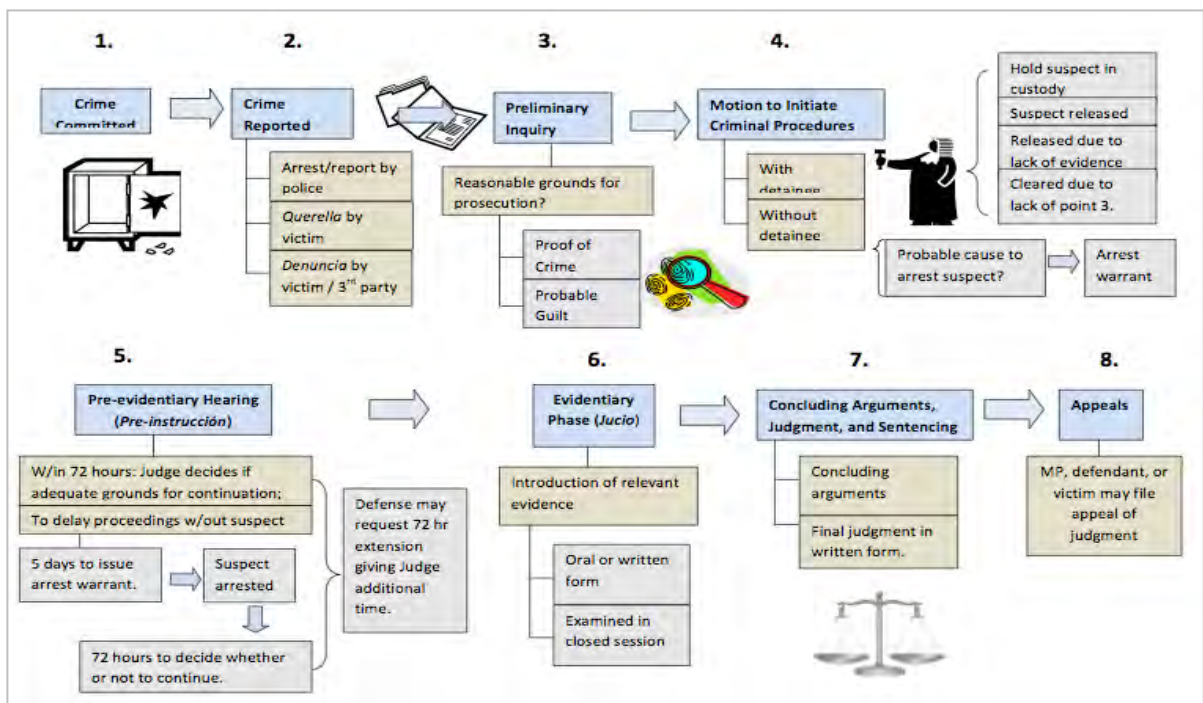
Like most civil law systems, the model shared by Mexico was built upon a model of inquisitorial criminal procedures. An inquisitorial model differs from the adversarial model adopted by most common law systems in several ways. In an adversarial model, the trial is a contest (often oral) between active attorneys who prosecute and defend the accused, typically held in a public setting. A passively participating judge ensures strict adherence to rules. In a typical inquisitorial model, the trial is an inquiry (often written) by an actively presiding judge who oversees the investigation, introduces evidence, calls witnesses and experts, and sentences the accused, typically in a closed setting. Attorneys usually play a more passive role.

²⁷ Schatz, "The Mexican Judicial System," 200.

²⁸ Louna M. Marquez-Carrasquillo and David A. Shirk, "State Level Justice Reform Initiatives in Mexico," *Trans-Border Institute Border Brief*, February 21, 2011, http://catcher.sandiego.edu/items/peacestudies/bp_carrasquillo.pdf

Just as the Mexican experience has uniquely influenced the evolution of a civil law system over history, Mexico developed a unique inquisitorial model of criminal procedures. Rather than an instructional judge who actively leads the investigation, in Mexico the powerful public prosecutor assumes the central roles of investigator and prosecutor after a crime is committed.²⁹ The police do not assist in the investigation; rather, the multi-step process (**Figure 3**) relies heavily on the public prosecutor in all phases. During investigation, the judge may assist by gathering some evidence on his own, including witness statements, in the form of written affidavits. During the final hearing, concluding arguments are presented by the prosecution and defense, typically conducted in a closed setting. Finally, the judge ruling determines guilt and sentencing.³⁰

Figure 3. Key Steps in Traditional Criminal Procedure in Mexico



Source: David A. Shirk, *Judicial Reform in Mexico: Change & Challenges in the Judicial Sector*, Trans-Border Institute Justice in Mexico Project (San Diego: Trans-Border Institute, 2010), 13.

²⁹ David A. Shirk, *Judicial Reform in Mexico: Change & Challenges in the Judicial Sector*, Trans-Border Institute Justice in Mexico Project (San Diego: Trans-Border Institute, 2010), 13.

³⁰ Ibid., 14.

Many problems emerge from this model. The public prosecutor carries much of the fact-finding burden independently. Many allege their autonomy lends to abuses such as mishandled evidence and forced confessions (often the *only* evidence).³¹ Also, gathering cumbersome written affidavits contributes to lengthy periods awaiting trial. Further, the closed setting of hearings undermines transparency and fosters the perception of corruption. Finally, the court first collects compelling indications of guilt and even holds the suspect in detention prior to sentencing.³² Thus, the judge appears less than impartial with such a prominent role in gathering evidence alongside the prosecutor while also tasked to decide a verdict. As depicted in the 2007 Emmy-winning documentary film *Presunto Culpable*, this model attributes to a widespread opinion in Mexico that a suspect is presumed guilty until proven innocent.

Produced by University of California-Berkeley graduate students, *Presunto Culpable* chronicles a mild-mannered videogame street vendor, Antonio Zúñiga, wrongfully accused of murder as he navigates the inner workings of a broken justice system. A judge convicts Zúñiga despite a questionable arrest by police, negative forensic tests, and testimony by a single unreliable witness. The film archives his retrial by the same judge, after discovering his original public defender practiced law with forged credentials. The hearings transpire in a closed setting that resembles a police precinct more than a courtroom, with Zúñiga observing from behind the bars of a small window in the back of the trial office. Following an absurd second conviction, the story concludes with a redeeming final acquittal in an appeals court.³³ Ironically, after the film was released in theaters, a judge suspended

³¹ David A. Shirk, "Criminal Justice Reform in Mexico: An Overview," *Mexican Law Review* Vol. III no. 2 (2010): 205.

³² Marquez-Carrasquillo, "State Level Justice Reform," 3.

³³ *Presunto Culpable*, directed by Geoffrey Smith (2007), currently available on-line only (English sub-titled), http://www.youtube.com/watch?v=2TRKXE_YboA

screenings in Mexico City. Incensed by the ruling, the public protested the decision as a thinly-veiled attempt by the corrupt judiciary to subvert the truth of the broken system. When the prohibition was lifted, the film soared in popularity to become the most successful documentary in Mexico's history.³⁴

Presunto Culpable documented specific weaknesses in the justice system previously supported by less known statistics. A neglected judicial branch with weak institutions has led to a tremendous backlog of cases. A lack of professional standards has left the judiciary susceptible to bribery. Most importantly, a lack of transparency in this closed system has fueled widespread public distrust. Without a justice system perceived as legitimate, crime itself goes unreported.

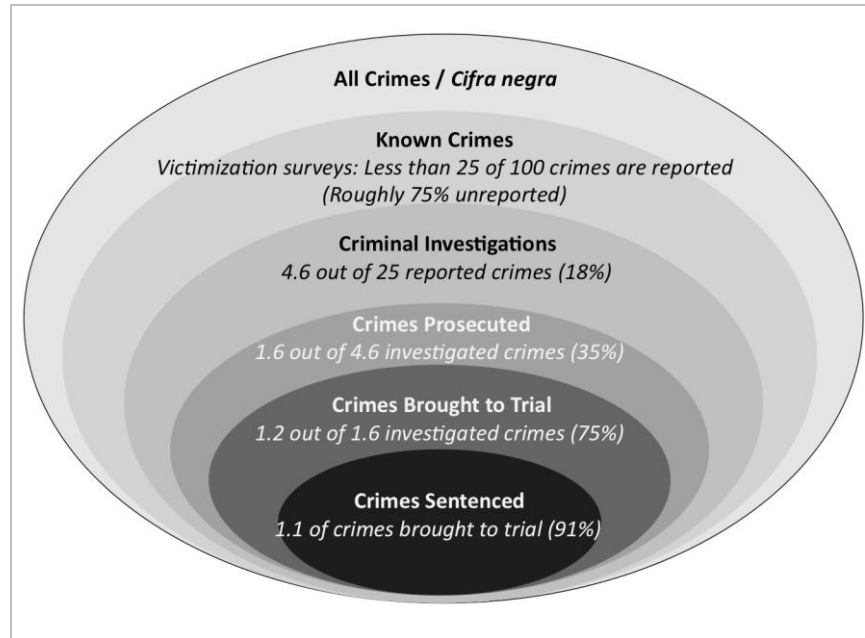
Mexican legal scholar Zepeda Lecuona diagrams the lifecycle of crime that has resulted in widespread impunity (**Figure 4**). Victim surveys indicate 75 percent crime goes unreported with even fewer crimes ever investigated, prosecuted, brought to trial and sentenced. Lecuona concludes that 98.9 percent of crimes committed never result in a sentence. Beyond impunity, he also discovers another disparaging fact: 85 percent of the misfortunate few suspects that are charged are found guilty.³⁵ As best summarized in the illustrative drama by Colonel Mark Maxwell, "[Mexico has] criminal impunity, on one hand, and no access to justice for those accused of a crime, on the other. . .the guilty never get convicted and those accused never get justice."³⁶ By 2008, the box office receipts of a landmark film provided evidence that the people of Mexico demanded a legitimate justice system.

³⁴ *The Economist*, "The Uglier Face of Justice," April 2, 2011, 53.

³⁵ Guillermo Zepeda Lecuona, "Criminal Investigation and the Subversion of the Principles of the Justice System in Mexico," in *Reforming the Administration of Justice in Mexico*, 142.

³⁶ Mark D. Maxwell, "Mexico's Judicial Reforms of 2008: Building a Legal Causeway, But from the Past or to the Future?," *lucenr: A Journal of National Security Studies*, 2008: <http://www.usnwc.edu/Lucent/OpenPdf.aspx?id=100&Title=Evolution>.

Figure 4. Lifecycle of a Crime in Mexico



Source: David A. Shirk, *Judicial Reform in Mexico: Change & Challenges in the Judicial Sector*, Trans-Border Institute Justice in Mexico Project (San Diego: Trans-Border Institute, 2010), 6.

2008 JUDICIAL REFORM PLAN

Several previous attempts to reform the justice system proved important but were insufficient. In 1994, constitutional amendments were passed that revitalized the judicial branch with overhauls to the Supreme Court.³⁷ In 2004, President Vicente Fox attempted comprehensive changes to the justice system under the new democracy, including budget increases, oral trials and professional requirements for public defenders. While he did not succeed in passing these reforms, Fox did succeed in promoting a national debate that paved the way for the 2008 Reform Plan passed under President Calderon.³⁸

The 2008 Reform Plan institutes sweeping changes that hope to provide greater transparency, accountability and due process in the Mexico justice system by 2016.³⁹ The

³⁷ Jeffrey K. Staton, "Lobbying for Judicial Reform: The Role of the Mexican Supreme Court in Institutional Selection," in *Reforming the Administration of Justice in Mexico*, 279.

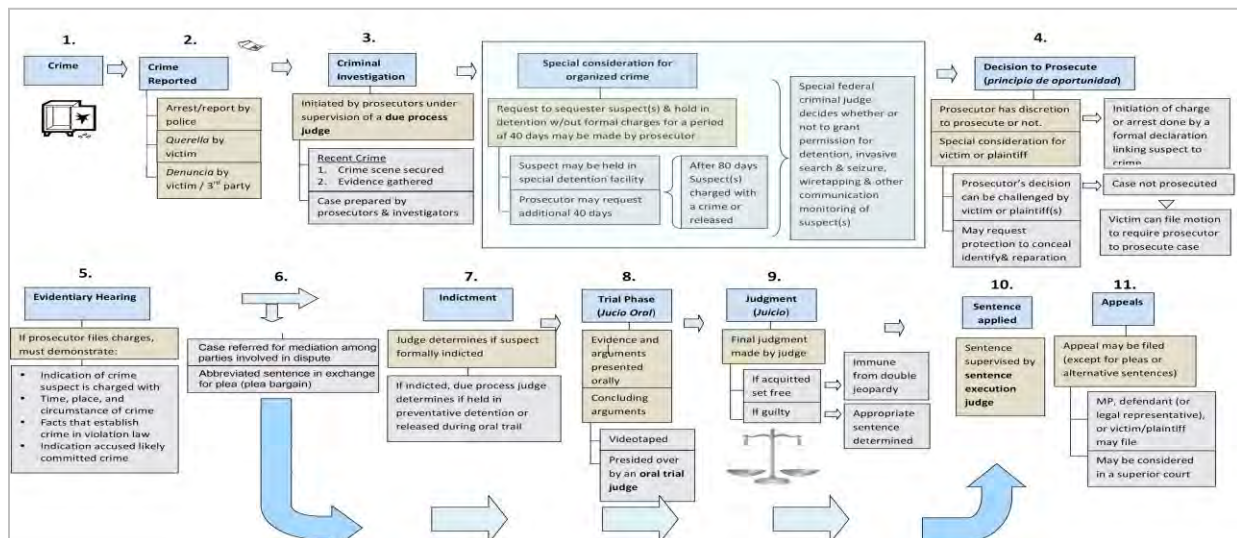
³⁸ Schatz, "The Mexican Judicial System," 216.

³⁹ Shirk, "Criminal Justice Reform in Mexico," 191.

ambitious 8-year plan is a bottom-up approach occurring state-by-state to pave the way for complete federal reform.⁴⁰ The measures are designed to strengthen the specific weaknesses that contribute to extraordinary high levels of criminal impunity and poor protection for the rights of the accused. In essence, Mexico is transitioning its justice system from a civil law-inquisitorial procedures model toward a civil law-*adversarial* procedures model that includes open and oral trials. The plan does not include jury trials.

Implementing open and oral trials should improve transparency with a completely new process of criminal procedures (**Figure 5**). A new emphasis on due process should improve accountability by ensuring the presumption of innocence. Further, the reforms implement alternative dispute resolution (ADR) mechanisms, such as negotiation, mediation, arbitration and conciliation, to decrease incarcerations.⁴¹ One state (Pueblo) has already reported a 95 percent agreement rate between parties using voluntary mediation.⁴² With an

Figure 5. Key Steps in New Adversarial Criminal Procedure in Mexico



Source: David A. Shirk, *Judicial Reform in Mexico: Change & Challenges in the Judicial Sector*, Trans-Border Institute Justice in Mexico Project (San Diego: Trans-Border Institute, 2010), 15.

⁴⁰ Ibid, 192.

⁴¹ Marquez-Carrasquillo, "State Level Justice Reform", 7.

⁴² Ibid, 8.

estimated 40 percent of prison populations held in pre-trial detention awaiting a final verdict, the ADR mechanisms should reduce the case backlogs.⁴³

While some critics remain, the nine states that have implemented these changes have had an overwhelmingly positive response, at least among the judiciary. Approximately 84 percent of judges and lawyers approve of the changes. They also viewed the importance of foreign training favorably, an important prerequisite for the U.S. assistance.⁴⁴ Accordingly, approximately \$149 million of the \$1.4 billion Mérida Initiative funding has been earmarked to institutionalize the rule of law.⁴⁵ As part of this program, USAID has administered training to over 4,300 judicial sector personnel.⁴⁶ Led by the U.S. Department of Justice, these cross-border workshops educate Mexican federal prosecutors in adversarial procedures.⁴⁷ However, while surveys of the judiciary indicate receptive approval of the changes, two recent studies from the World Bank and the World Justice Project (WJP) indicate the progress has been too slow and insufficient for the impatient public.

THE JURY CORRELATION

Nearly three years into the plan, the results are discouraging. According to the World Bank's *World Governance Indicators Project 2010*, Mexico continues to rank in the 33rd percentile for rule of law, still placing it among the world's worst systems.⁴⁸ The WJP's *Rule of Law Index 2011* is a pivotal report evaluating eight specific factors of effective rule of law

⁴³ Shirk, "Criminal Justice Reform in Mexico," 210.

⁴⁴ Ingram, *Justiciabárometro*, 124.

⁴⁵ Clare Ribando Seelke, *Mexico-U.S. Relations: Issues for Congress*, Report for Congress (Washington, D.C.: Congressional Research Service, June 3, 2010) 15-16.

⁴⁶ Clare Ribando Seelke and Kristin M. Finklea, *U.S.-Mexico Security Cooperation: The Merida Initiative and Beyond*, Report for Congress (Washington, D.C.: Congressional Research Service, August 15, 2011), 11.

⁴⁷ Brady McCombs, "US to Aid Mexico's Judicial Reforms," *Arizona Daily Star*, September 27, 2010, <http://azstarnet.com/>

⁴⁸ The World Bank, *World Governance Indicators Project*, assessed on September 27, 2011, <http://info.worldbank.org/governance/wgi/pdf/c141.pdf>.

around the world with each factor scored on a scale of 0 to 1.0.⁴⁹ This comprehensive study examines not only written laws, but also how laws are implemented in practice and perceived and experienced by the citizens. A country profile also provides a snapshot comparison to the highest performer and regional averages. Among the 66 nations compared, Mexico ranked 53rd for corruption, 58th for security to citizens, and 63rd for the criminal justice system (**Figure 6**). In Latin America, only Bolivia and Venezuela finished behind Mexico in these areas.⁵⁰ Even despite ongoing reforms, little progress appears to have been made.

Among all the countries compared by the *Rule of Law Index*, each system has evolved to be uniquely different. Some systems effectively use a civil law code but allow adversarial criminal procedures, just as Mexico has pursued with its reforms. However, many effective criminal justice systems have taken the next step. While the *Rule of Law Index* does not explicitly provide an overall ranked list of nations, the scored data can be used to calculate this ranking and then organized to reach an important conclusion. After calculating the unweighted average score of each nation using all eight factors, the resulting overall ranked list of nations reveals a statistical break separating the top third from the rest (**Table 1**). When each nation's corresponding legal systems is analyzed, among these top twenty-two nations in the world one common thread emerges: 77 percent use jury trials. Even more importantly, among the top ranked nations with a civil law system comparable to Mexico, 80 percent use juries, the majority of which use mixed tribunals. This correlation is not coincidental, and implementing jury trials is the recommendation that Mexico must take.

⁴⁹ The *World Justice Project* is a multi-national multinational, multidisciplinary non-profit organization which seeks to strengthen the rule of law worldwide. Originally launched by the American Bar Association in 2006, WJP defines the rule of law around four universal principles and publishes an annual index comparing many countries of the world. Honorary chairs include Madeleine Albright, Bill Gates, and Collin Powell. See World Justice Project, <http://worldjusticeproject.org/>

⁵⁰ Mark David Agrast, Juan Carlos Botero, and Alejandro Ponce, *The World Justice Project Rule of Law Index 2011*, WJP Annual Report (Washington, D.C.: The World Justice Project, 2011), 112.

Figure 6. WJP Rule of Law Index 2011 Mexico Country Profile

Mexico

Mexico City, Guadalajara,
Monterrey

1. WJP Rule of Law Index

Income
Upper Middle

Region
Latin America
& Caribbean

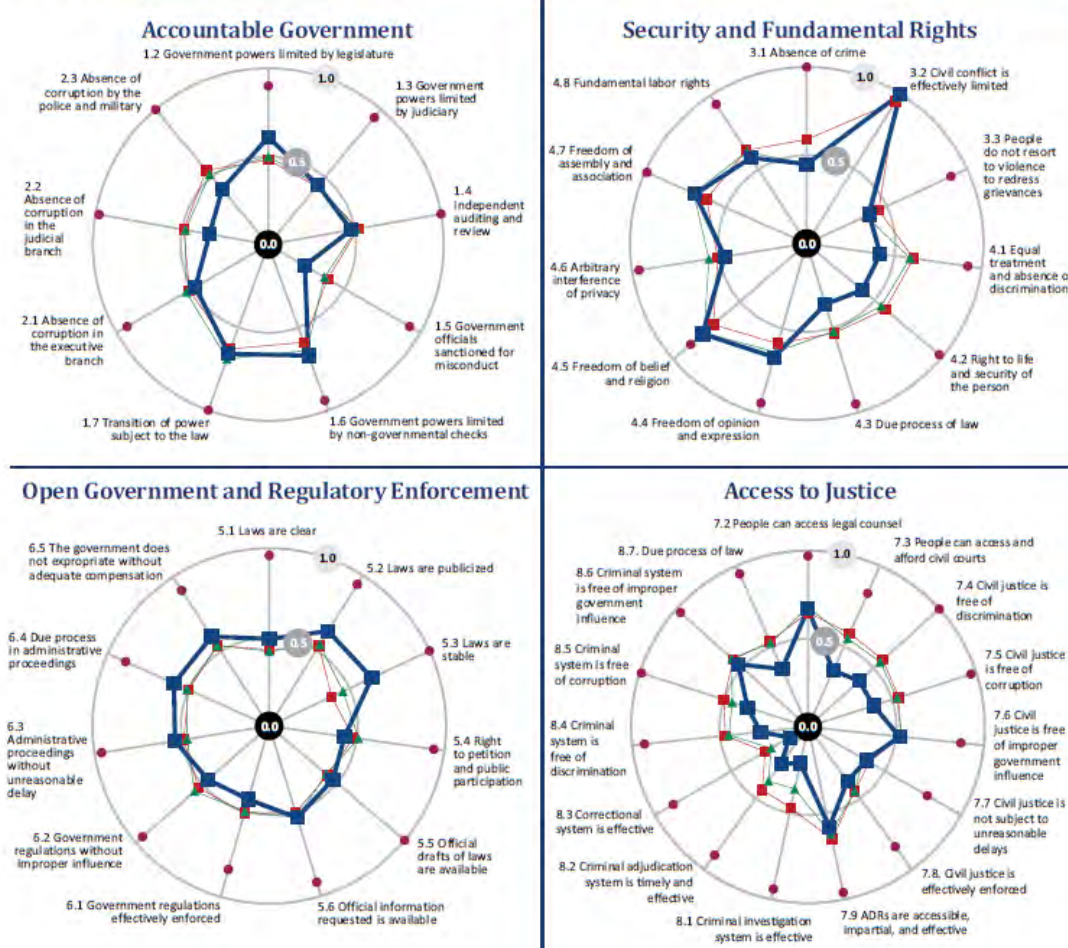
Population
109m (2010)
78% Urban
26% in three
largest cities

WJP Rule of Law Index Factors	Score	Global Ranking	Regional Ranking	Income Group Ranking
Factor 1: Limited Government Powers	0.52	40/66	7/12	9/19
Factor 2: Absence of Corruption	0.41	53/66	10/12	17/19
Factor 3: Order and Security	0.61	53/66	7/12	13/19
Factor 4: Fundamental Rights	0.55	45/66	10/12	13/19
Factor 5: Open Government	0.53	27/66	4/12	5/19
Factor 6: Regulatory Enforcement	0.53	35/66	6/12	8/19
Factor 7: Access to Civil Justice	0.46	57/66	11/12	18/19
Factor 8: Effective Criminal Justice	0.30	63/66	11/12	17/19

2. Scores for all WJP Rule of Law Index sub-factors

In each graph, a sub-factor is represented by a radius from the center of the circle to the periphery. The center of each circle corresponds to the lowest possible score for each sub-factor (0.00); the outer edge of the circle marks the highest possible score (1.00).

Key:  Mexico  Top Score  Upper Middle Income  Latin America & Caribbean



Source: Mark David Agrast, Juan Carlos Botero and Alejandro Ponce, *The World Justice Project Rule of Law Index 2011*, (Washington, D.C.: World Justice Project, 2011), 79.

Table 1. Comparison of Top Legal Systems and Justice Systems Types

Rank	Country	Jury Trials	Jury Type	Civil Law	Overall Average	Avg for Mexico Worst Factors (3)	1. Limited Govt Powers	2. Absence of Corruption	3. Order & Security	4. Fundamental Rights	5. Open Government	6. Regulatory Enforcement	7. Access to Civil Justice	8. Effective Criminal Justice
1	Sweden	Y	MT	x	0.8750	0.8800	0.90	0.92	0.92	0.92	0.88	0.90	0.76	0.80
2	Norway	Y	L	x	0.8650	0.9000	0.91	0.91	0.93	0.90	0.74	0.86	0.81	0.86
3	New Zealand	Y	L		0.8575	0.8867	0.91	0.95	0.87	0.86	0.83	0.82	0.78	0.84
4	Netherlands			x	0.8225	0.8433	0.81	0.88	0.84	0.87	0.79	0.79	0.79	0.81
6	Japan	Y	MT	x	0.8038	0.8600	0.78	0.90	0.92	0.78	0.76	0.80	0.73	0.76
5	Germany			x	0.8038	0.8300	0.81	0.83	0.88	0.84	0.73	0.77	0.79	0.78
7	Austria	Y	MT	x	0.8025	0.8467	0.80	0.87	0.88	0.85	0.76	0.75	0.72	0.79
8	Australia	Y	L		0.7950	0.8233	0.85	0.86	0.87	0.83	0.76	0.78	0.67	0.74
9	United Kingdom	Y	L		0.7863	0.8033	0.80	0.80	0.86	0.79	0.79	0.79	0.71	0.75
10	Hong Kong	Y	L		0.7838	0.8933	0.75	0.88	0.95	0.73	0.77	0.66	0.68	0.85
11	Estonia	Y	MT	x	0.7825	0.8167	0.79	0.86	0.84	0.82	0.72	0.75	0.73	0.75
12	Canada	Y	L	x	0.7813	0.8367	0.80	0.85	0.90	0.79	0.77	0.72	0.66	0.76
13	Singapore			x	0.7513	0.8967	0.70	0.91	0.95	0.62	0.59	0.74	0.67	0.83
14	Belgium	Y	MT	x	0.7475	0.7933	0.77	0.82	0.85	0.80	0.65	0.67	0.71	0.71
15	France	Y	MT	x	0.7350	0.7833	0.74	0.83	0.84	0.79	0.61	0.72	0.67	0.68
16	United States	Y	L		0.7300	0.7767	0.73	0.78	0.86	0.73	0.72	0.70	0.63	0.69
17	UAE				0.7100	0.8567	0.60	0.83	0.90	0.53	0.57	0.73	0.68	0.84
18	Spain	Y	MT	x	0.7075	0.7600	0.72	0.77	0.81	0.80	0.57	0.64	0.65	0.70
19	South Korea	Y	MT	x	0.7075	0.7500	0.59	0.74	0.83	0.76	0.71	0.69	0.66	0.68
20	Poland	Y	MT	x	0.6963	0.7633	0.75	0.74	0.83	0.80	0.56	0.59	0.58	0.72
21	Czech Republic			x	0.6850	0.7533	0.67	0.69	0.81	0.81	0.53	0.57	0.64	0.76
22	Chile	Y	L		0.6775	0.6767	0.73	0.77	0.67	0.74	0.63	0.64	0.65	0.59
23	Italy	Y	MT	x	0.6363	0.7267	0.59	0.70	0.75	0.73	0.47	0.55	0.57	0.73
	Mexico			x	0.4888	0.4400	0.52	0.41	0.61	0.55	0.53	0.53	0.46	0.30

Source: Mark David Agrast, Juan Carlos Botero and Alejandro Ponce, *The World Justice Project Rule of Law Index 2011*, (Washington, D.C.: World Justice Project, 2011). "MT" indicates a jury type of "mixed tribunals". "L" indicates a jury type of "lay participants" only. The overall average scores are unweighted averages of all 8 factors. For comparison, overall averages for Mexico's worst three factors only (2,3 and 8) are also included. Original analysis conducted from report data.

S. Africa	0.5925	0.5733	0.62	0.61	0.55	0.65	0.56	0.59	0.60	0.56
Brazil	0.5900	0.5900	0.61	0.67	0.62	0.67	0.51	0.57	0.59	0.48
Indonesia	0.5875	0.5967	0.66	0.46	0.73	0.65	0.52	0.54	0.54	0.60
Ghana	0.5863	0.5633	0.70	0.49	0.65	0.72	0.49	0.50	0.59	0.55
Peru	0.5738	0.5300	0.65	0.47	0.62	0.72	0.51	0.56	0.49	0.50
Colombia	0.5525	0.4967	0.61	0.56	0.50	0.59	0.59	0.56	0.58	0.43
India	0.5088	0.4367	0.63	0.42	0.38	0.63	0.55	0.45	0.50	0.51

The jury is both the most effective way of establishing the people's rule and the most efficient way of teaching them how to rule.

- Alexis de Tocqueville, *Democracy in America*

The modern jury trial has existed since eleventh century England and subsequently spread across the globe by colonization.⁵¹ The famous French historian Alexis de Tocqueville first described the virtues of jury trials in his book *Democracy in America* after travelling through the United States in the early nineteenth century. The modern jury allows a group of lay citizens to participate first-hand in the administration of justice. Many jury systems institute "mixed tribunals," in which several trained judges deliberate alongside lay

⁵¹ Kennedy M. Maranga, "The Jury System a Symbol of Justice: Comparative Analysis," *Social Science Research Network*, February 28, 2011, 4, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1551622

jurors. While a wide variation of culturally-influenced jury types exist around the world, Tocqueville was impressed by the basic premise of lay participation in justice by ordinary citizens. He viewed trial by jury as an institution that improved both the rule of law and educated society about their duties as citizens in a democracy.⁵²

Today, Mexico must strengthen both a weak rule of law and a fledgling democracy. Instituting significant changes in historical judicial procedures and deeply ingrained legal practices is difficult under normal circumstances, let alone amid a violent drug war that is currently undermining government legitimacy. As previously noted by Morris, “given the anti-state/pro-society bias, strengthening the rule of law must rely on the institutionalized empowerment of citizens through various co-governance arrangements.”⁵³ Amidst this crisis, the best way to strengthen both the rule of law and democracy requires deepening justice reforms—Mexico must empower the people to become part of the process. Implementing jury trials is one such viable measure to promote public confidence in the broken system. As Tocqueville asserted, ordinary citizens participating in a jury provide a shield against corruption, a foundation for legitimacy and a safeguard against tyranny.

Protection Against Corruption

Jury trials provide protection against corruption. Mexico faces a daunting scope of corruption fueled by the drug war. Drug traffickers use bribery and threats of violence to undermine the very reforms attempting to regain legitimacy.⁵⁴ The perception of corruption has destroyed public confidence in judges (45 percent), prosecutors (28 percent) and police

⁵² Alexis de Tocqueville, *Democracy in America* (New York: HarperCollins Publishers, 2007), 143.

⁵³ Morris, “Mexico’s Political Culture,” 341.

⁵⁴ Juan D. Lindau, “The Drug War’s Impact on Executive Power, Judicial Reform, and Federalism in Mexico,” *Political Science Quarterly* Vol. 126 No. 2 (2011): 194.

(16 percent).⁵⁵ Crime is not reported due to a lack of faith in the justice system to do anything about it.⁵⁶ While a longer exposure to democracy tends to lower corruption, it only does so over time, and Mexico cannot afford to wait.⁵⁷

Unlike the current judge in Mexico's system, a jury has limited access to the parties in litigation. By remaining separate from the parties in conflict, an unbiased jury is not susceptible to bribery or extortion. Critics argue that fear of terrorist gang reprisal will influence Mexican jurors. However, while a concern (63.6 percent), a majority of Mexicans believe they would make a fair judgment (60.7 percent) in spite of this threat.⁵⁸ Additionally, a jury does not serve the agenda of a political appointer or electing public. Following a verdict that displeases those in power, the jury can go home and not worry about being removed from the bench.⁵⁹

Foundation of Legitimacy

The justice system of Mexico suffers from a fundamental lack of legitimacy.⁶⁰ While open courts and oral trials improve transparency, these measures do not encourage the public participation necessary to build legitimacy. Without addressing legitimacy, more enforcement tools or better laws will be insufficient.⁶¹ Jury participation by citizens can immediately improve this weakness. Critics might argue that jury trials play an insignificant role within hypocritical nations that expound their virtues. In truth, even in well-developed systems like the United States, the majority of criminal cases never see a jury. Similarly,

⁵⁵ Fukurai, "Is Mexico Ready for a Jury Trial?," 29.

⁵⁶ Morris, "Mexico's Political Culture," 331.

⁵⁷ Luminita Ionescu, "Mexico's Pervasive Culture of Corruption," *Economics, Management and Financial Markets* Vol. 6 No. 2 (2010): 183.

⁵⁸ Fukurai, "Is Mexico Ready for a Jury Trial?," 25.

⁵⁹ Gregory W. O'Reilly, "Opening Up Argentina's Courts," *Judicature* Vol. 80 No. 5 (1997): 240.

⁶⁰ Morris, "Mexico's Political Culture," 329.

⁶¹ *Ibid.*, 339.

many citizens in Mexico may never personally participate in jury duty. However, it is not just jury participation, but the mere *existence* of the process that is important to inspire collective confidence.

First, the personal experiences of even a few participants can spread quickly through social and familial networks, with media coverage accelerating the process.⁶² Second, with jury trial as an alternative for the accused, the longstanding power of the prosecutor in Mexico—trusted only slightly more than police—is transferred to the criminal defendant. A defendant may wield the protection of a jury trial as a bargaining chip, forcing the prosecutor to more carefully evaluate the evidence before proceeding, consider an ADR mechanism such as a plea bargain, or dismiss the case. The existence of juries applies more pressure on both the prosecutor and defender to get it right before going to trial. Legal scholars have long agreed that the jury trial endows a “ritual by which the faith of the community in the administration of criminal justice is maintained.”⁶³

Safeguard Against Tyranny

Finally, the modern jury system has taken hold around the world as a safeguard against tyranny. During the 1735 trial of John Zenger, a New York newspaper printer accused by the British Governor of libel, a jury acquitted the colonist despite the explicit direction of the judge.⁶⁴ This landmark incident not only ignited the sparks of a coming revolution but also demonstrated the power of a jury system to check excessive government power. Not surprisingly, the recent *Democracy Index 2010* report shows all 54 nations

⁶² Park, “The Globalizing Jury Trial: Korea,” 577.

⁶³ Ibid.

⁶⁴ Maranga, “The Jury System a Symbol of Justice,” 7.

categorized as “authoritarian regimes” have no juries.⁶⁵ History shows that when these regimes rise to power—including the Bolsheviks in Russia, the Nazis in Germany, and the PRI in Mexico—juries are abolished.⁶⁶ Conversely, when democracy takes hold, juries tend to appear. Their presence even increases participation in the electoral process.⁶⁷ A recent wave of nations—including Argentina, Spain, South Korea and Japan—are currently embracing the jury to strengthen democracy.⁶⁸

The tale of Chile and Argentina also provides Mexico a cautionary lesson among Latin America countries. In the 1980s, both nations emerged from authoritarian rule into a democracy and pursued similar justice reforms to move from inquisitorial to adversarial procedures. Chile advanced reforms on several fronts by dismantling the institutional legacies of corruption and implementing jury trials.⁶⁹ Argentina neglected such liberal reforms and stopped short of jury trials. Instead, Argentina returned to an earlier debate that concluded “the jury depends on people viewing themselves as the rulers, not the ruled”⁷⁰ and determined the public was not ready. Fortunately, Mexico does not face the same ambiguity as Argentina. Despite claims to the contrary, a recent study revealed strong support for jury trials by the majority of Mexican people.⁷¹ Today, Chile has a rule of law ranked among the top nations in the world that acts more swiftly and resolves more cases than before.⁷² Meanwhile, despite over a decade since adversarial reforms, Argentina continues to suffer from deepened cultural toleration for corruption and has recently turned

⁶⁵ “Democracy Index 2010,” Economist Intelligent Unit of *The Economist*, assessed on October 21, 2011, http://graphics.eiu.com/PDF/Democracy_Index_2010_web.pdf.

⁶⁶ Park, “The Globalizing Jury Trial: Korea,” 535.

⁶⁷ Maranga, “The Jury System a Symbol of Justice,” 13.

⁶⁸ Park, “The Globalizing Jury Trial: Korea,” 529.

⁶⁹ John J. Bailey and Wayne A. Cornelius, “Reforming the Administration of Justice in Mexico: Strategies and Requisites,” in *Reforming the Administration of Justice in Mexico*, 497.

⁷⁰ O’Reilly, “Opening Up Argentina’s Courts,” 238.

⁷¹ Fukurai, “Is Mexico Ready for a Jury Trial?,” 43.

⁷² Antonio Marangunic and Todd Foglesong, *Charting Justice Reform in Chile: A Comparison of the Old and New Systems of Criminal Procedures*, Vera Institute of Justice (New York: Vera Institute of Justice, 2004), 13.

back to jury trials in a desperate search for a solution.⁷³ Mexico must learn from Argentina's missed opportunity.

CONCLUSION

After a history of authoritarian rule, Mexico's new democracy has confronted many significant challenges and must continue to reform weaknesses in its justice system to build a legitimate rule of law. The 2008 Reform Plan has overcome opposition among the judiciary and offers promising changes through open and oral trial procedures and alternative dispute resolution. These significant measures will improve transparency and reduce case backlogs currently crippling the justice system. While new laws are not desired, new regulations are critical. Action must be taken to improve professional standards among the judiciary. These measures include standardized law school education, certification by bar exams and mandatory membership in the Mexican Bar Association. With a judiciary receptive to change, the time to implement these reforms is now. While these actions will improve legitimacy over time, the most important reform today is reinstituting jury trials.

The rule of law finds origins rooted in culture and customs. Mexico has developed a unique civil law system. However, as evidenced by the worldwide acceptance among the top-ranked civil law states, jury trials are compatible with Mexican justice and a familiar part of its past. By allowing citizens to return to the process, jury trials will provide the means to overcome corruption and strengthen democracy. A mixed tribunal seems the most apparent answer; however, careful consideration by Mexico will be required to determine the best solution.

⁷³ Bailey, "Reforming the Administration of Justice in Mexico," 498.

Finally, implementing a jury system incurs costs that cannot be ignored. Initial investments include the renovation of courts and education of the judiciary. The additional operating expenses to select, compensate, and accommodate juries must also be considered. For example, the state of New York incurs over \$4 million annually just to accommodate and compensate jury members.⁷⁴ However, this is less than \$5 million reward offered for one Joaquin “El Chapo” Guzman and pales in comparison to the societal damage he has caused. The benefits of establishing a legitimate rule of law in Mexico far outweigh the cost.

⁷⁴ Park, “The Globalizing Jury Trial: Korea,” 539.

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